

2:51 pm, Sep 11, 2019

U.S. DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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NORTHFIELD INSURANCE COMPANY,

Plaintiff,

-against-

MANNARA CONTRACTING CORP.,  
KING GONG SPORTS, INC., MIN-AL  
PROPERTIES, INC., and THOMAS  
BARTON, d/b/a Barton's Place,

Defendants.

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FEUERSTEIN, District Judge:

Pending before the Court is the *sua sponte* Report and Recommendation of the Honorable Anne Y. Shields, United States Magistrate Judge, dated August 22, 2019 (“the Report”), (1) recommending that the answer of defendant King Gong Sports, Inc. (“King Gong”) be stricken and that an order of default be entered against King Gong pursuant to Rule 37(b) of the Federal Rules of Civil Procedure for its “failure to participate in this litigation and to comply with Court Orders,” (Report at 3); and (2) advising, *inter alia*, (a) that “[a]ny written objections to th[e] Report . . . must be filed . . . within fourteen (14) days of service of th[e] [R]eport,” (Report at 5) (citing 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 6(a) and Rule 72(b)), and (b) that “[f]ailure to file objections within fourteen (14) days will preclude further review of th[e] [R]eport . . . either by the District Court or Court of Appeals.” (*Id.*) (citing *Thomas v. Arn*, 474 U.S. 140, 145, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Caidor v. Onondaga Cnty.*, 517 F.3d 601, 604 (2d Cir. 2008)). In accordance with the Report, plaintiff served a copy of the Report upon King Gong via regular mail and overnight mail sent to its last known address on August 23, 2019. (See Docket Entry

[“DE”] 49). King Gong has not filed any timely objections to the Report, nor sought an extension of time to do so. For the reasons set forth below, the Report is accepted in its entirety.

## I. Standard of Review

Any party may serve and file written objections to a report and recommendation of a magistrate judge on a dispositive matter within fourteen (14) days after being served with a copy thereof. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Any portion of such a report and recommendation to which a timely objection has been made is reviewed *de novo*. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). The court, however, is not required to review the factual findings or legal conclusions of the magistrate judge as to which no proper objections are interposed. *See Thomas*, 474 U.S. at 150, 106 S. Ct. 466. Where a party “received clear notice of the consequences of the failure to object” to a report and recommendation on a dispositive matter, *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir. 1992) (quotations and citation omitted); *accord Mario v. P&C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989), his “failure to object timely to [that] report waives any further judicial review of the report.” *Frank*, 968 F.2d at 16; *see also Smith v. Campbell*, 782 F.3d 93, 102 (2d Cir. 2015); *Caidor*, 517 F.3d at 604.

Nonetheless, the waiver rule is non-jurisdictional and, thus, the Court may excuse a violation thereof “in the interests of justice.” *Neita v. Precision Pipeline Sols.*, 768 F. App’x 12, 14 (2d Cir. Apr. 29, 2019) (summary order) (citing *United States v. Male Juvenile (95-CR-1074)*, 121 F.3d 34, 39 (2d Cir. 1997)); *see also DeLeon v. Strack*, 234 F.3d 84, 86 (2d Cir. 2000). “Such discretion is exercised based on, among other factors, whether the defaulted argument has substantial merit or, put otherwise, whether the magistrate judge committed plain error in ruling

against the defaulting party.” *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 174 (2d Cir. 2000); *accord Neita*, 768 F. App’x at 14.

## II. Review of Report

Since King Gong has not filed any timely objections to Magistrate Judge Shields’s Report, nor sought an extension of time to do so, it has “waive[d] any further judicial review of the findings contained in the [R]eport.” *Spence*, 219 F.3d at 174. As the Report is not plainly erroneous, the Court will not exercise its discretion to excuse King Gong’s default in filing timely objections to the Report in the interests of justice. Accordingly, the Report is accepted in its entirety and, for the reasons set forth therein, King Gong’s answer is stricken pursuant to Rule 37(b) of the Federal Rules of Civil Procedure.<sup>1</sup>

## III. Conclusion

For the reasons set forth above, the Report is accepted in its entirety and, for the reasons set forth therein, King Gong’s answer is stricken pursuant to Rule 37(b) of the Federal Rules of Civil Procedure. In the interests of judicial economy and efficiency, plaintiff’s motion for a default judgment against defendant Thomas Barton (“Barton”), d/b/a Barton’s Place, is denied without prejudice to renewal in conformance with the briefing schedule set for plaintiff’s motion(s) for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure against defendant Min-Al Properties, Inc., and for the entry of a default judgment pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure against the remaining defendants.

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<sup>1</sup> On September 4, 2019, the Clerk of the Court entered King Gong’s default in this action pursuant to Rule 55(a) of the Federal Rules of Civil Procedure.

Accordingly, plaintiff shall serve its motion(s), including proposed judgments against all of the non-appearing defendants, by September 20, 2019; defendants' responses thereto shall be served by October 21, 2019; and plaintiff shall serve a reply, and file the fully-briefed motion(s) in accordance with the undersigned's individual rules, by no later than October 31, 2019. A status conference and hearing on plaintiff's motion(s) for the entry of a default judgment against all of the non-appearing defendants will be held before the undersigned on December 19, 2019 at 11:15 a.m. in Courtroom 1010 at the Central Islip Courthouse.

Plaintiff shall serve a copy of this Order upon defendants King Gong, Barton and Mannara Contracting Corp., and file proof of such service with the Court.

SO ORDERED.

/s/ *Sandra J. Feuerstein*  
SANDRA J. FEUERSTEIN  
United States District Judge

Dated: September 11, 2019  
Central Islip, New York